Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 98-9346
(Second Circuit)

In The

Supreme Court of the United States

♦

October Term, 1999

LYNN GOLD,

Petitioner,

vs.

DALKON SHIELD CLAIMANTS TRUST,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

LYNN GOLD
Pro Se Petitioner
140 Southport Woods Drive
Southport, Connecticut 06490
203-259-9875

02PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and the Circuit Court erred in finding a Rule 26(a)(2)(B) report was required for treating physicians and other non-retained experts; and granting summary judgment because such reports were not supplied?

2. Whether the handling of the case by the District Court and the Circuit Court was related to the *pro se* status of the petitioner in giving deference to the representations of counsel for the respondent rather than allowance for the petitioner?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER, LYNN GOLD, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit filed and entered August 4, 1999.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at A - 3. The opinion of the District Court in Connecticut at New Haven in *Gold v. Dalkon Shield Claimants Trust*, Civ. No. B-82-383 (EBB) is not published but can be found at 1998 WL 351456 (A - 6). The rehearing opinion of the United States Court of Appeals for the Second Circuit is reported at A - 2.

STATEMENT OF JURISDICTION

(i) The date of the judgment of the District Court (District of Connecticut at New Haven, Burns, J.) was entered on July 23, 1998. The judgment of the Second Circuit panel was issued on August 4, 1999.

(ii) My petition for panel rehearing was timely filed and was denied on September 15, 1999. My Petition for Rehearing En Banc is presently pending; it was filed October 4, 1999; and a motion for filing it out of time was granted on January 24, 2000, thus rendering it timely filed. Pursuant to applications for an extension of time for filing, this Petition For

A Writ Of Certiorari is timely filed on or before February 14, 2000 (A - 1).

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56(f) provides:

> **Rule 56: Summary Judgment**
>
> **(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Federal Rule of Civil Procedure 26(a)(2)(B) provides:

> **Rule 26(a)(2)(B): General Provisions Governing Discovery; Duty of Disclosure**
>
> **(a) Required Disclosures; Methods to Discover Additional Matter.**
>
> **(2) Disclosure of Expert Testimony.**
>
> **(B)** Except as other wise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all

> opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Federal Rules of Evidence 706 provides:

> **Rule 706: Court Appointed Experts**
>
> **(a) Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate, A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

> **(b) Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs....

STATEMENT OF THE CASE

I, Lynn Gold am the petitioner. I am appearing *pro se* but I have received help in this petition from my attorney in the Second Circuit, Richard H. G. Cunningham, who is not yet admitted before the Supreme Court of the United States.

Original Court Jurisdiction

The case was brought under 38 U.S.C. § 1332a – diversity of citizenship and the amount in controversy exceeding the jurisdictional requirements.

Statement of Facts

The record establishes that this case is about the Dalkon Shield intrauterine contraceptive device (IUD) and the injuries I received from its use (A - 7). The Dalkon Shield was inserted on May 3, 1972 and I had immediate problems (A - 6, 7). Subsequent problems with infection occurred in January 1978 and Dr. David B. Weinstein diagnosed the situation as endometritis (A - 33-34). The Dalkon Shield stayed in place until severe

abdominal pain necessitated its removal on February 8, 1979 (A - 7, 34). Not long after the problems of the Dalkon Shield became public knowledge, I found that I was functionally infertile (A - 7). In the early 80s I was tested for anything else which could have led to the tubal scarring and the tests came up negative. Over ten years later, I was again tested (this time with tests which were not even in existence in the early 80s) and again all results were negative for scarring causes other than as a result of the injuries known to be caused from using a Dalkon Shield medical device.

I was an original litigant and my suit was brought prior to the A.H. Robins bankruptcy. In October 1996, I proceeded *pro se*.

The next point of importance begins with my filing on April 8, 1998 of my list of witnesses. I included in my list the treating doctors — Hennisch and Weinstein (A - 22). I also included other witnesses including experts whom I had tried to engage but had not retained because I didn't have the money. Even treating physician David B. Weinstein, MD did not want to talk to a *pro se* party (A - 30). In response to my filing, the Trust (respondent) claimed that I had to file Rule 26(a)(2)(B) reports (A - 41). I wrote back that I didn't think so but asked for some rule that I had to do so since the witnesses had not been retained (A - 42). The Dalkon Shield Claimants Trust attorney replied with a Motion for Summary Judgment And For Extension Of Expert Identification Deadline (A - 40). This was specifically premised on the claim that I needed "retained" experts as set forth in Rule 26(a)(2)(b) (A - 40).

I discovered Federal Rule of Evidence #706 and asked the Connecticut District Court to appoint an expert witness because I thought that counsel for the Trust must be right and, acting *pro se*, I could not get even the treating doctors to cooperate both due to my lack of money to retain witnesses and their reluctance to deal with a *pro se* party (A - 23, 25). The District Court, instead of understanding the difficulty, found that it would not be fair in our adversary system to use Rule 706 because it thought I could

not ever pay for the expert (A - 18-20)! So I asked for more time to retain an expert — but this was turned down also (A - 13).

In the Motion for Summary Judgment And For Extension Of Expert Identification Deadline, counsel for the Dalkon Shield Claimants Trust included medical records [some of which I had never seen before and had been told in '94 by Dr. Hennisch that he no longer had any of my records or even a medical file on me]. However, the Trust left out the crucial part of Dr. Weinstein's contemporaneous medical notes which indicated his finding of endometri**t**is (A - 33). I know that you are not interested in the issue of facts, however what happened was that the Trust claimed that my diagnosis was endometri**osis** (A - 32) and that this condition could not be due to the Dalkon Shield. The Trust offered no proof from any expert to support their statement, i.e., that I had had endometriosis or that this was a condition which the Dalkon Shield could not have caused. The problem was that the Connecticut District Court believed counsel for the Trust instead of the evidence because I, a *pro se* litigant, was not given credence.

The Connecticut District Court found that experts and specialized reports from all of them were required, that no retained experts were disclosed, and, hence, granted summary judgment (A - 6-10). The Connecticut District Court did not consider that the treating physicians were disclosed and that non-retained experts had been disclosed. No, counsel for the Trust had insisted that **retained** experts were required and the Connecticut District Court concurred with this misrepresentation of the rule (A - 9), stating "The defendant maintains that the plaintiff cannot demonstrate cause in fact because she has failed to retain an expert to testify."

Moreover, when I asked for consideration under Federal Rule of Civil Procedure 56(f) (A - 11-17, 31) and indicated that I would be taking the deposition of the treating physician, etc. — the time for discovery being still open — I was ignored.

Although I tried to get the Connecticut District Court to re-consider its actions, I was not successful (A - 24, 30, 31). Indeed, when David B. Weinstein, MD gave a letter report stating that the Dalkon Shield was the cause of my endometritis problem (A - 34) and Richard Sweet, MD (who had also been timely disclosed) (A - 35) opined as to cause, the Connecticut District Court merely concluded that these documents did not meet the requirements of Rule 26(a)(2)(b) and accused Dr. Weinstein of changing his diagnosis. The Connecticut District Court extended the complex reporting requirements to both treating and non-treating un-retained experts, something that not even litigants represented by counsel are required to do under the rules (A - 15).

On my appeal to the Second Circuit I got some writing help and also found counsel willing to argue the case for me but, when it came time to argue, the Second Circuit panel refused to allow argument because — although shown to be false later — counsel for the Trust claimed not to have had notice that counsel was to argue for me (A - 37). One judge (as only shown on the tape recording of the 7/12/99 court session) laughed when he said the panel would not hear my argument.

The Second Circuit Court panel's decision not only adopted the reasoning of the Connecticut District Court but even added that I had had access to doctors who, in fact, had not given me access prior to summary judgment (A - 4 and A - 23, 25). The fact is that only when an attorney became involved was access effected. Re-hearing was denied without opinion (A - 2) and a Petition for Re-Hearing En Banc is presently pending — the Second Circuit Court having not properly recorded the Petition received on October 4, 1999, but as of 1/24/00 now permitting it out of time.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT AND THE SECOND CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT A RULE 26(a)(2)(B) REPORT WAS REQUIRED FROM TREATING PHYSICIANS AND OTHER NON-RETAINED EXPERTS.

Rule 26(a)(2)(B) requires that experts or persons retained or specially employed for testimony provide certain statements. The wording is clear that only those retained experts are required to provide the reports. Some district courts have been expanding the rule a little at a time to require reports from physicians who are given additional information from counsel, though primarily in dicta. No district court has definitely gone so far as to outright require, by interpretation, reports from non-retained experts, though this is not certain as most merely refer to "experts" and have no discussion relating to retained versus unretained experts. (See e.g., *Salas v. United States*, 165 F.R.D. 31 (W.D.N.Y. 1995). Cases generally have allowed not only that Rule 26(a)(2)(B) reports are not required but that treating doctors may testify as to causation (*Shappardon v. West Beach Estates*, 172 F.R.D. 415 (D. Hawaii, 1997); *Hall v. Sykes et al*, 164 F.R.D. 46, U.S. Dist 1995; *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, U.S. Dist 1997). In *Riddick v. Washington Hospital Center*, 183 F.R.D. 327 (D.D.C. 1998) the Court held that the plaintiff could prove the causation and all other proof required in a medical malpractice case through the treating physician. That is essentially equivalent to the proof of my case through Dr. Weinstein.

The reason for the distinction between retained and non-retained experts is really quite easy to understand. If an expert is

retained, he is being paid for his testimony and the party has substantial control over him. But where an expert is not being paid, one has no control or ability to force the expert to provide the complex report.

The importance of this distinction cannot be lost for it was the basis for the motion for summary judgment. This matter is of utmost importance not only to me but to others similarly situated who are not in the position of readily paying hired experts. The other facet of the situation is that these two courts are saying that a treating physician is considered identical to a non-treating, retained expert witness physician.

The rulings of the District Court and approval of the Second Circuit Court of Appeals are to the effect that there is no distinction between retained and unretained experts. These rulings are in error.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT AND THE SECOND CIRCUIT COURT OF APPEALS ERRED IN GIVING DEFERENCE TO COUNSEL FOR THE RESPONDENT TRUST RATHER THAN ALLOWANCE FOR THE *PRO SE* PETITIONER.

The problem of how to treat *pro se* parties is of increasing importance in the American legal system. Generally, courts give some leeway in both pleading and the handling of some evidence to help in the interests of justice. The Supreme Court gave some direction particularly in the area of allowing the party pleading leniency in *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Other courts, however, take the view that they will do nothing beyond advising the *pro se* party to get counsel.

The issues relating to the "crisis" of *pro se* litigation are weil set forth in a long note by Professor Engler, Fordham Law Review, April 1999, pages 1987-2070: "And Justice For All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks."

Engler writes (at page 2021): "Judicial treatment of unrepresented litigants varies widely." He also notes a study in which 91% of the judges surveyed indicated that their courts had no general policy relating to the handling of *pro se* litigants (at page 2013).

It is generally recognized that courts sometimes give greater credence to established attorneys over those who are new to the bar — tending to rule in favor of an experienced attorney. In the case of a *pro se* party, this tendency is especially pernicious and the courts should be very careful not to give a "halo" effect to the positions of attorneys. In my case, the position taken by the attorney for the Trust, i.e., that reports under Rule 26(a)(2)(b) were required of even the treating physicians, was clearly erroneous BUT nevertheless the District Court ruled, and then the Circuit Court adopted, this erroneous reasoning.

The only explanation can be the deference to counsel for the Dalkon Shield Claimants Trust. Indeed in July '99, when counsel for the Trust claimed not to have known in advance that lawyers would be arguing for me (A - 37), the Circuit Court gave complete deference, although it was acknowledged by such Trust counsel later to have been untrue (A - 38-39). The entire original summary judgment motion was premised not on any statements of doctors or experts but on representations of counsel for the Dalkon Shield Claimants Trust. Not a ***single*** statement was given outside of representations made by counsel for the Trust.

On the Rule 706 request, although I never indicated I would not be able to compensate the appointed witness later, the Connecticut District Court ruled on the Trust's representation that it would be unfair to require the Dalkon Shield Claimants Trust to pay for the witness and then denied the motion on this basis. This was entirely a matter of deference to the representations of counsel for the Dalkon Shield Claimants Trust. What is additionally noteworthy is that counsel for the Dalkon Shield Claimants Trust invited this abuse of *pro se* litigants directly in its brief and the Connecticut District Court at New Haven absorbed

this attitude. (A - 32).

My request under FRCP 56(f) was not even addressed in the District Court decisions. I had indicated that discovery was still open and that I intended to take the deposition of Dr. Weinstein (A - 24). The Connecticut District Court, instead, ignored the fact that I could prove the matter through his testimony alone and, because I had not supplied the Rule 26(a)(2)(B) reports, used that alleged failure to sanction me with summary judgment. This was done at the instigation of counsel for the Trust to whom the Connecticut District Court at New Haven gave complete deference.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES IN THIS CASE ARE IMPORTANT BEYOND THE IMMEDIATE CASE.

The meaning of FRCP 26(a)(2)(B) effects the rights of all litigants to call expert witnesses who are not retained. If this is not made clear, it is likely that other district courts will, not by rule but by mere whim and interpretation, require litigants to produce reports they cannot provide and thus deny these litigants their rightful day in court. This would not affect the well-to-do or major corporations or attorneys who are well able to finance cases. It does affect those who are of humbler circumstances and the ability of attorneys who are unable to pay in advance of trial for retained experts. Furthermore, in many cases such experts are not needed (e.g., testimony is available from treating physicians, admissions from related, previous trials can provide valuable evidence, etc.)

The way in which courts are to treat *pro se* parties must be clarified by the highest court because the legal system presently is inconsistent at best and pernicious at worst. Only by treatment from this Court will there be a clear signal to the American judicial and legal communities to take care not to defer to

attorneys but to more carefully weigh the issues.

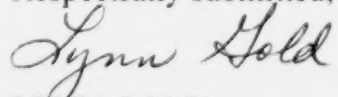
CONCLUSIONS AND REQUESTS

For the reasons provided above, I request that this petition be granted.

I know that few cases get certified. I hope you will consider that the issues raised are important, both with regard to the Federal Rules as they relate to expert reports as well as to the treatment of *pro se* litigants as a class. *Pro se*s are treated very differently by judges and their clerks – some providing allowance for a *pro se*'s imperfect pleadings and circumstances while other judges and their clerks are disdaining towards the *pro se* litigants and give undue deference to counsel.

Accordingly, I, Lynn Gold, respectfully request that my petition for a writ of certiorari be granted.

Respectfully submitted,



LYNN GOLD
Pro Se Petitioner
140 Southport Woods Drive
Southport, Connecticut 06490
203-259-9875

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

January 25, 2000

Ms. Lynn Gold
140 Southport Woods Drive
Southport, CT 06490

Re: Lynn Gold
V. Dalkon Shield Claimants Trust
Application No. 99A472

Dear Ms. Gold:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on January 25, 2000, extended the time to and including February 14, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
_____/S/_____
Ruth Jones
Assistant Clerk

UNITED STATES COURT OF APPEALS
for The Second Circuit
United States Court House
40 Foley Square
New York 10007

Karen Greve Milton
Acting Clerk

At a stated term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifteenth day of September, one thousand nine hundred and ninety-nine.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,
HONORABLE JOHN M. WALKER, [Seal]
HONORABLE JOSÉ A. CABRANES,
CIRCUIT JUDGES.

Lynn Gold,

Plaintiff-Appellant,

- v. - Docket No. 98-9346

Dalkon Shield Claimants Trust,

Defendant-Appellee.

A petition for panel rehearing having been filed herein by appellant Lynn Gold

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk

By:_____/s/_____
Beth J. Meador,
Administrative Attorney

United States Court of Appeals
for The Second Circuit

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourth day of August, one thousand nine hundred and ninety-nine.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,
HONORABLE JOHN M. WALKER, [Seal]
HONORABLE JOSÉ A. CABRANES,
Circuit Judges.

LYNN GOLD,
Plaintiff-Appellant,
- v. - No. 98-9346
DALKON SHIELD CLAIMANTS TRUST,
Defendant-Appellee.

Appearing for Appellant: Lynn Gold, pro se (Richard H. G. Cunningham, of counsel), Southport, Connecticut; also represented by Beverly Knapp, Shrader and Knapp, Westport, Connecticut

Appearing for Appellee: Elizabeth C. Honeywell, Venable, Baetjer and Howard, LLP (R. Cornelius Danaher, Jr., Nancy K. Roux, Danaher, Tedford, Lagnese & Neal, PC, Hartford, Connecticut, of counsel), Baltimore, Maryland.

Appeal from the United States District Court for the District of Connecticut (Burns, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is hereby AFFIRMED.

Lynn Gold appeals from Judge Burn's adverse grant of summary judgment and refusal to appoint an expert witness or I've her additional time to locate one. We affirm the grant of summary judgment for substantially the reasons stated by the district court, see Gold v. Dalkon Shield Claimants Trust, No. B-82-383, 1998 WL 351456, at *2-*3 (D. Conn, June 15, 1998), and hold that the district court did not abuse its discretion in denying appellant's motion for reconsideration, see Gold v. Dalkon Shield Claimants Trust, No. 5:82-CV-383, 1998 WL 422900 (D. Conn. July 16, 1998) (noting, inter alia, that appellant had access to and knew of doctors well before granting of summary judgment). We further find that the district court did not abuse its discretion in refusing to appoint an expert pursuant to Fed. R. Evid. 706, see Gold v. Dalkon Shield Claimants Trust, No. B-82-383, 1998 WL 351466 (D. Conn. June 3, 1998), or in declining to extend the time for appellant to retain one.

We therefore affirm.

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk

_____/S/_____ ___8/4/99____
By:
[Signature is of Lucille Carr]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LYNN GOLD	:	
	:	
v.	:	No. B-82-383 (EBB)
	:	
DALKON SHIELD CLAIMANTS TRUST	:	

RULING ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

In 1982, the plaintiff, Lynn Gold, brought an action against A.H. Robins Company, alleging personal injury caused by the Dalkon Shield, an intrauterine contraceptive device ("IUD"), designed, manufactured, and sold by the defendant company. After A.H. Robins Company declared bankruptcy, a Plan of Reorganization ("Plan") was created in 1988 that established the Dalkon Shield Claimants' Trust ("Trust") to handle the many claims filed against the company in relation to the Dalkon Shield. Ms. Gold attempted to resolve her claim through the settlement procedure detailed in the Plan. When this process failed to resolve the matter to her satisfaction, the plaintiff was certified on December 13, 1996 by the United States Bankruptcy Court for the Eastern District of Virginia to reopen her previous litigation, filed in this court. On January 30, 1998, the plaintiff filed her second amended complaint in the reopened litigation. Now the defendant moves the Court for summary judgment pursuant to FED.R.CIV.P. 56. For the reasons set forth below, the defendant's motion (Doc. No. 68) is **GRANTED**.

I. Statement of Relevant Facts

The Court summarizes only those facts believed necessary to an understanding of the issues in, and the decision rendered on, this motion. The facts are culled from the affidavits, depositions and other exhibits submitted by both parties. Unless otherwise indicated, these facts are not in dispute between the parties.

The plaintiff's medical records show that she had a Lippes Loop IUD inserted in September, 1970. This IUD was later removed

due to partial expulsion from the uterus. On May 3, 1972 a Dalkon Shield IUD was inserted into the plaintiff's uterus. The next month the plaintiff complained of heavy menses and cramping. The Dalkon Shield was checked and evaluated as "O.K." On January 31, 1978 the plaintiff had a pelvic exam which led to a diagnosis of endometriosis. On February 8, 1979 the Dalkon Shield was removed. Throughout the time the Dalkon Shield was in place the plaintiff's medical records reflect that she intermittently complained of abdominal discomfort.[1]

On July 8, 1980, Dr. Theodore Reed performed a hysterosalpingogram on the plaintiff. This procedure involves injection of a radiopaque material after which the fallopian tubes and uterus can be visualized by roetgenography (x-ray). The radiologist concluded that the plaintiff suffered from bilateral hydrosalpinx, i.e., distension of the fallopian tubes by clear fluid. The same procedure was performed by Dr. Reed again on April 2, 1981. A different radiologist concluded that the plaintiff had persistent hydrosalpinx "presumably due to a past PID" (pelvic inflammatory disease).

In 1994, the plaintiff had blood samples sent by the Stamford Department of Health to the Centers for disease Control to rule out chlamydia as a cause of the presumed PID. Her clinical diagnosis on the blood test order forms is listed as infertility. The blood tests were negative for chlamydia.

II. Legal Analysis

A. The Standard of Review

In a motion for summary judgment the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matte of law. FED.R.CIV.P. 56(c); Anderson v. Liberty Lobby, 477 U.S. 242, 256, 106 S.Ct. 2505, 2518, (1986); Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18 (2d Cir. 1995). A court must grant summary judgment "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact.'" Miner v. City of Glen Falls, 999 F.2d 655, 661 (2d Cir. 1993) (citation omitted).

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[1] The plaintiff also testified in her deposition that she experienced a recurrent fever beginning in the late fall of 1978 and proceeding into January 1979. In addition, she recounts having experienced an episode of acute abdominal pain which probably coincided with the fever. Pl's Dep. at 73.

"A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir.), cert. denied, 506 U.S. 965, 113 S.Ct. 440, (1992) (quoting Anderson, supra, 477 U.S. at 248).

After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 254, (1986). As a corollary, the moving party is entitled to summary judgment if it can show that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

The Court is mandated to resolve "all ambiguities and draw all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." Aldrich, supra. 963 F.2d at 523. Hence, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849, 112 S.Ct. 152 (1991). See also Suburban v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992).

B. The Connecticut Product Liability Act claim

The Court has jurisdiction over this action pursuant to 18 U.S.C. § 1332 (conferring diversity jurisdiction). Therefore, the plaintiff's cause of action lies under Connecticut law, specifically, the Connecticut Product Liability Act ("CPLA"), Conn Gen. Stat. § 52-572m et seq. She claims damages based on the theories of strict liability in tort, negligence, failure to warn, breach of warranty, and fraudulent misrepresentation.[2] Because each of these theories requires the plaintiff to prove causation, the following analysis applies to the plaintiff's entire cause of action.

As just intimated, the deficiency in the plaintiff's case is found in her inability to meet her burden of proof as to causation. Under

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[2] The plaintiff also alleges "civil conspiracy" in her Second Amended Complaint. Because no such tort lies under the CPLA, either explicitly, see Conn. Gen Stat. § 52-572m(b), or implicitly under the common law, the Court need not address this allegation.

The CPLA a plaintiff must prove that the product was defective and that the defect proximately caused her injuries. Sharp v. Wyatt, Inc., 627 A.2d 1347, 1352 (Conn. App. 1993). A requisite element of proximate cause is "cause in fact." See e.g. Fitzgerald v. Manning, 679 F.2d 341, 348 (4th Cir. 1982) (defining proximate cause in a medical malpractice action); Sharp, 627 A.2d at 1354 (explicating the requirements for proximate cause under Conn. Gen. Stat. § 52-572q(c)).

The defendant maintains that the plaintiff cannot demonstrate cause in fact because she has failed to retain an expert to testify as to the causal link between any defects in the Dalkon Shield and her injuries. Def.'s Mem, in Supp. Of Mot. For Summ. J. at 5. The plaintiff argues that she will prove causation with the testimony of a court-appointed expert, written reports, and affidavits. Pl.'s Mem. In Opp'n to Mot. For Summ. J. at 13.

The Court has recently declined to appoint an independent expert as requested by the plaintiff.[3] The dispositive issue for the resolution of this motion for summary judgment is, therefore, whether a reasonable jury could find that the plaintiff has met her burden of proof as to causation without the benefit of expert testimony. Expert testimony is required when the factual content of the underlying issues is not found within the laypersons' common knowledge and experience. Fane v. Zimmer, 927 F.2d 124, 131 (2d Cir. 1991) (affirming the trial court's directed verdict for the defendant in a product liability case because, absent expert medical testimony on the issue of causation, the plaintiffs could not prove the elements of strict liability or negligence); In re Flanagan, 690 A.2d 865, 876 (Conn. 1997) (applying this standard in the context of an alleged ethical violation by a state court judge).

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[3] See Ruling on Plaintiff's Petition to have the court Appoint Expert Witnesses, dated June 3, 1998. The Court concluded that the plaintiff failed to make a strong enough showing that the issues involved were so highly technical that it is necessary to interfere with the adversarial process by appointing an independent expert for which the defendant would have to bear the expense. That decision however, does not contradict the court's finding in this Ruling that a jury of laymen do need expert guidance in determining causation. The Court simply places the burden of proving the plaintiff's case on the plaintiff, where it properly belongs in our adversarial system.

Medical evidence relating to causes of injury to the human body is not normally considered to dwell within the common knowledge of a layperson. Connecticut v. McClary, 541 A.2d 96, 100 (conn. 1988) (citing Collette v. Collette, 418 A.2d 891, 894 (Conn. 1979).

To meet her burden of proof as to cause in fact, the plaintiff must establish a causal link between a defect in the Dalkon Shield and her claimed injuries. Specifically, she must demonstrate that it is more probable than not that a defective tail string in the Dalkon Shield caused her to contract PID which then led to her infertility. The plaintiff cannot make this showing from articles and clinical studies which conclude that a defective tail string in the Dalkon Shield tends to cause PID which often leads to infertility. She must prove by a preponderance of the evidence that this series of events that she alleges actually occurred in her case. The Court finds that expert medical testimony is the sole means by which she can carry this burden of proof.

Even assuming that the plaintiff can show that the Dalkon Shield was defective and that she suffered the injuries she claims, without a proffer of expert medical testimony as to causation to link the defect to the injury, a reasonable jury could not find that the plaintiff has proved that the defect caused her specific injuries. She, therefore, fails to demonstrate the existence of a triable issue of fact to go to a jury. Given the absence of evidence to rove the plaintiff's case, the defendant trust is entitled to summary judgment. Cavallo v. Starr Enterprise, 892 F. Supp. 756, 774 (E.D. Va. 1995) (granting summary judgment for defendant in a toxic tort case when the plaintiffs failed to offer admissible expert testimony in opposition to defendant's summary judgment motion), aff'd, 100 F.3d 1150 (4th Cir. 1996).

II. Conclusion

For the foregoing reasons, the defendant's Motion for Summary Judgment (Doc. No. 68) is **GRANTED**.

SO ORDERED

/S/

ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut, this 15th day of June, 1998.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LYNN GOLD	:	
	:	
v.	:	No. B-82-383 (EBB)
	:	
DALKON SHIELD CLAIMANTS TRUST	:	

RULING ON PLAINTIFF'S MOTION TO RECONSIDER AND RE-ARGUE

INTRODUCTION

On June 15, 1998, this Court granted the Dalkon Shield Claimants Trust's ("Trust" or "Defendant") Motion for Summary Judgment, holding that the case commenced by Lynn Gold ("Ms. Gold" or "Plaintiff") was deficient as a matter of law due to her inability to meet her burden of proof as to causation. This deficiency warranted the grant of summary judgment in that Plaintiff had failed to retain an expert to testify to the causal link between any defects in the Dalkon Shield and her injuries, despite this Court granting numerous extensions of time for Ms. Gold to do so.

On June 25, 1998, Ms. Gold filed the present Motion for Reconsideration and To Re-Argue that decision, submitting two reports of alleged experts, which experts Plaintiff contends meet her burden of proof on causation.

STATEMENT OF FACTS

The pertinent facts of this case are set forth in the Court's Rulings on Motion To Have the Court Appoint Expert Witnesses and the Motion for Summary Judgment. The court assumes familiarity with those decisions, and sets forth herein only those

additional facts necessary to an understanding of the issues raised in, and the decision rendered on, the present Motion.

On February 28, 1998, after granting Plaintiff numerous extensions of time to comply with court-ordered deadlines, an Amended Scheduling Order was entered in this case. In pertinent part, Plaintiff was ordered to identify any expert witness she intended to call at trial and mail to the Defendant a copy of said experts' opinions, in compliance with Federal Rule of Civil Procedure 26 (a) (2) (B), on or before March 27, 1998. Discovery was to close June 1, 1998, dispositive motions were to be filed by June 15, 1998, with replies thereto by June 29, 1998. A tentative trial date of July 6, 1998 was set forth.

Plaintiff did not comply with the order on expert witnesses, and filed an untimely motion for extension of time to do so on April 3, 1998. Keeping Plaintiff's status of an alleged pro se party to the forefront, the Court granted the motion.

On April 6, 1998 Plaintiff filed a list of fifteen names with addresses (in some instances, incomplete addresses) from all over the country. She did not file any documents whatsoever in compliance with Rule 26 (a) (2) (B). Rather, the Court, and the Defendant, were left to speculate as to who these individuals were and what relevant testimony they would possibly offer at the trial of this case.

With their opposition to the present Motion, Defendant has filed a copy of a letter it sent to Plaintiff on April 9, 1998. The letter clearly spells out to Ms. Gold what her responsibilities were under Rule 26 (a) (2) (B) and that her list of names was legally unacceptable under that Rule. Accordingly, Defendant requested the lacking experts' reports. Defendant further advised Ms. Gold that, if it had not received the required reports by April 15, 1998, it intended to move for summary judgment, raising her lack of an expert witness as a basis for dismissal of her case. Plaintiff replied that she had consulted an attorney, and stated her position that she need not provide expert opinions until she had actually retained an expert. She did not address the fact that her deadline for retaining an expert had already passed.

On April 24, 1998, having received no compliance from Plaintiff, Defendant moved for summary judgment.

On May 11, 1998, while the Motion for Summary Judgment was pending, Plaintiff moved the Court to appoint expert witnesses for her, pursuant to Federal Rule of Evidence 706. After due consideration, the request was denied on June 3, 1998. On June 8, 1998, more than two months after her original Rule 26 (a) (2) (B) deadline, Plaintiff filed a Motion for Extension of Time in which to obtain an expert witness. On June 15, 1998, the Court determined that this Motion, unlike her five previous Motions for Extension of Time, should be denied. The Ruling granting Defendant's Motion for Summary Judgment was also issued on that date.

LEGAL ANALYSIS

I. The Standard of Review

Plaintiff has filed her Motion for Reconsideration and to Re-Argue pursuant to Local Rule of Civil Procedure 9(e). The Second Circuit Court of Appeals has held that motions for reconsideration under this Local Rule are, as a practical matter, the same thing as motions for amendment of judgment under Federal Rule of Civil Procedure 59(e) — each seeks to reopen a district court's decision on the theory that the court made mistaken findings in the first instance. "As such . . . we believe that a motion under local rule 9(e) must be treated the same as a motion under Rule 59." City of Hartford v. Chase, 942 F.2d 130, 133 (2d Cir. 1991).

A motion for reconsideration made pursuant to Rule 59(e) must adhere to stringent standards. Oxford House, Inc. v. City of Albany, 155 F.R.D. 409, 410 (N.D.N.Y. 1994). A plaintiff filing such a motion faces a heavy burden in pursuing such a motion. Wilson v. consolidated Rail Corp., 815 F.Supp. 585, 586 (N.D.N.Y. 1993). The court's rulings under the rule are "committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion." McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983).

Rule 59(e) recognizes only three possible grounds for any motion for reconsideration: (1) an intervening change in the law; (2) the availability of new evidence not previously available; and (3) the need to correct a clear error of law or prevent manifest injustice. Doe v. New York City Dep't. Of Social Services, 709 F.2d 782, 789 (2d Cir.), cert. *denied sub nom*, Catholic Home Bureau v. Doe, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983). Prong one clearly has no applicability to the present Motion. Hence, the Court will examine only prong two and three, seriatim.

II. The Standard As Applied

As to the second prong, the court holds that the two letters from Plaintiff's alleged experts are too little, too late. As noted above, Plaintiff virtually ignored the Court Scheduling Order as to the notification of Defendant as to her expert witnesses. It was not until days after the due date that Plaintiff even moved for an extension of time, and when granted, Plaintiff filed a mere list of names and some addresses, completely avoiding the dictates of Rule 26 (a) (2) (B). Plaintiff filed another belated motion for extension of time to obtain expert witnesses on June 8, 1998, two months after the deadline had passed. The affidavit from her lawyer-adviser admits that he never contacted Dr. Weinstein until April 30, 1998, weeks after the deadline had passed and after the motion for summary judgment was already pending.

The proffer of the two doctors' testimony is still not in compliance with Rule 26 (a) (2) (B). As to Dr. Weinstein, his current proffer is in direct contradiction to his contemporaneous notes of twenty years ago when he served as Plaintiff's treating physician. Nowhere is any of his notes, during his entire history of treating her, does he opine that Plaintiff was suffering, or had suffered, from pelvic inflammatory disease. Further, it is simply not credible that, if this evidence was to be presented at the trial of this matter, Plaintiff exercised any form of due diligence in securing an opinion allegedly twenty years old any sooner than

the present. [1]

Dr. Sweet's letter is also merely conclusory and fails to meet the standards of Rule 26 (a) (2) (B). His cursory three-paragraph letter does not contain a complete statement of all opinions to be expressed and the basis and reasons therefore; all of the date or other information considered by him in forming his opinion; any exhibits to be used as a summary of or support for his opinion; his qualifications and publications; his compensation; and a listing of any other cases in which he testified as an expert. Fed.R.Civ.P. 26 (a) (2) (B). Most importantly, his conclusion that "the defective design of the Dalkon Shield and its tail-string increased the risk for Ms. Gold to develop pelvic inflammatory disease" is not supported in any manner in his alleged "expert" opinion. It does not appear that De. Sweet even examined Plaintiff.

It also is not credible that Plaintiff could not have secured this letter in a time concordant with this Court's Scheduling Order. De. Sweet's name and address, with no other information at all, was filed with this Court on April 6, 1998. It is unacceptable, therefore, that his written report was not prepared or filed until two and one-half months, later, after summary judgment had been granted.

For these reasons, then, the Court holds that prong two of the Doe test is not met herein. The proffered letters are simply not "new evidence previously unavailable."

As to prong three, the Court holds that no clear error of law was made or that a manifest injustice needs to be prevented. First, the Court held that expert testimony was required when the factual content of the underlying issues is not found within the lay persons' common knowledge and experience and that such

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[1] The Court notes further that Dr. Weinstein's letter does not contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by him in forming his opinion; any exhibits to be used as a summary of or listing of any other cases in which he testified as an expert Fed.R.Civ.P. 26 (a) (2) (B).

testimony was required in this case. It is beyond cavil that this holding is not unprecedented, novel, or a remarkable proposition of law. This Court is convinced that no "clear error of law" has been made in so holding.

Second, if any manifest injustice is implicated in the consideration of this Motion, it would be from the granting of the Motion, and it would be to Defendant. Defendant has attempted to work diligently and responsibly with Plaintiff, her constant vilification of Defendant aside. The Trust advised Ms. Gold, in advance, that if she continued to fail to comply with the Court's Scheduling Order, that it would move for summary judgment. This was an uncommon courtesy.

Further, Judge Robert E. Merhige, before whom all the nation-wide Dalkon Shield litigation was pending, ordered that trial of all Trust cases be commenced on or before July 31, 1998. Plaintiff has known of this deadline since Judge Merhige entered Administrative Order No. 2 on October 31, 1997. She also knew that this Court intended to comply with this Order by scheduling a July trial date. Despite this knowledge — and to the great detriment of the Trust — Plaintiff has continually failed to comply with this Court's Scheduling Order that would have permitted preparation by the parties and trial of the case within the deadline set by Judge Merhige.

Finally, this court must comment on Plaintiff's continued insistence on her foibles and tribulations as an alleged *pro se* plaintiff. It is elementary that pleadings filed pro se are to interpreted liberally. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). It is the belief of this Court that it has more than met this standard. This is regardless of the fact that Plaintiff admits that she is being advised and assisted by attorneys in her case, which attorneys have never filed a formal appearance herein. One of the attorneys has gone so far as to file two affidavits in this case setting forth the legal support for Plaintiff's position. This same attorney has also averred that he has been instrumental in securing the letters of Dr. Sweet and Weinstein. The Court now believes that Plaintiff's pleadings,

seemingly filed pro se, have given her an unwarranted advantage of having the liberal pleading standard applied by this Court, whilst holding the Defendant to a much stricter scrutiny. *Accord* Johnson v. Bd. Of County Com'rs. County of Fremont, 868 F. Supp. 1226, 1231 (D. Colo. 1994), aff'd, 85 F.3d 489 (10th Cir. 1996); *see also* Wesly v. Don Stein Buick, 987 F.Supp. 884 (D.Kan. 1997) (court parties have legitimate concern that attorney who substantially participated in case may be required to enter appearance and accept accountability pursuant to Rule 11 and the rules of professional conduct applicable to attorneys). For this reason, too, a manifest injustice to Defendant would occur if the Court were to grant this Motion.

CONCLUSION

Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge." Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 383, 390 (D.P.R. 1981). For this reason, and the reasons set forth herein, Plaintiff's Motion For Reconsideration and to Re-Argue [Doc. No. 91] is DENIED.

The Clerk is directed to close this file.

SO ORDERED

_____/S/_____
ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut this 16th day of July, 1998.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LYNN GOLD	:	
	:	
v.	:	No. B-82-383 (EBB)
	:	
DALKON SHIELD CLAIMANTS TRUST	:	

RULING ON PLAINTIFF'S PETITION TO HAVE THE COURT APPOINT EXPERT WITNESSES

In 1982, the plaintiff, Lynn Gold, brought an action against A.H. Robins Company, alleging personal injury caused by the Dalkon Shield, an intrauterine contraceptive device ("IUD"), designed, manufactured, and sold by the defendant company. After A.H. Robins Company declared bankruptcy, a Plan of Reorganization ("Plan") was created in 1988 that established the Dalkon Shield Claimants' Trust)"Trust") to handle the many claims filed against the company in relation to the Dalkon Shield. Ms. Gold attempted to resolve her claim through the settlement procedure detailed in the Plan. When this process failed to resolve the matter to her satisfaction, the plaintiff was certified on December 13, 1996 by the United States Bankruptcy Court for the Eastern District of Virginia to reopen her previous litigation, filed in this court. On January 30, 1998, the plaintiff filed her second amended complaint in the reopened litigation. Now the plaintiff moves the Court to appoint expert witnesses pursuant to FED.R.EVID. 706. For the reasons set forth below, the plaintiff's petition (Doc. No. 71) is **DENIED**.

Discussion

The plaintiff represents that she is unable to obtain the services of an expert witness due to the financial expense involved. She argues that the Court should appoint expert witnesses because FED.R.EVID. 706 was promulgated to promulgated to promote fairness when one party to a lawsuit is disadvantaged. Mem. In Supp. Of Petition at 1.

The defendant objects to the court appointment of experts, contending that Rule 706 should be used only in extraordinary circumstances. Mem. in Opp'n at 4. According to the defendant, the plaintiff has failed to establish any circumstances meriting the appointment of experts and is merely utilizing her petition as a delaying tactic. Id. At 3. While the Court does not believe Ms. Gold is attempting to delay, the Court agrees with the defendant that the appointment of an expert is inappropriate under these circumstances.

The decision whether or not to appoint an expert is discretionary with the trial court. Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, 383 (D.D.C. 1985). Appointment of an expert under Rule 706 is not commonplace, usually occurring under compelling circumstances. In re Joint Eastern and Southern Districts Asbestos Litigation, 830 F. Supp. 686, 693 (E. & S.D.N.Y 1993); Applegate, 628 F. Supp. at 383 (citing United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984)).

A study of federal district court judges discovered that judges appoint experts infrequently and usually only when there is complex scientific evidence involved, when the parties' experts are diametrically opposed and when the adversarial system fails to provide information needed for the just resolution of a case. Joe S. Cecil & Thomas W. Willgiving, Accepting Daubert's Invitation: Defining a Role for Court-appointed Experts in Assessing Scientific Validity, 43 Emory L.J. 995, 1060 (1994).

Respect for the adversarial process is a reason often cited by judges for a decision not to appoint an expert. Id. at 1015.

This Court also holds great respect for the adversarial process and would not lightly interfere in its operation. The circumstances of this case do not warrant such judicial intervention. The nature of the evidence involved is not so highly technical that the court requires independent expert guidance.

Cost issues constitute a second reason the Court declines the plaintiff's invitation to appoint experts. Court-appointed experts in civil cases, other than those cases implicating the just compensation clause of the fifth amendment, must be paid by the parties. FED.R.EVID. 706(c). Courts have broad discretion in determining how to allocate the costs of a court-appointed expert between the parties. Cecil and Willging, at 1045. Although the indigence of one party need not prevent a court from appointing an expert, see McKinney v. Anderson, 924 F.2d 1500, 1511 (9th Cir. 1990), judges have expressed reluctance to charge all of the costs to one party, unless the non-indigent party agrees to pay. Cecil & Willging, at 1051.

In the instant case, the defendant, far from offering to pay for a court-appointed expert, objects to the appointment. Even were the Court to direct both parties to pay for the expert, the plaintiff has indicated that she cannot do so. Therefore, the burden would fall on the defendant. The Court is unwilling to place this financial burden on the defendant. The defendant is a trust which holds a fiduciary responsibility to all of the claimants who have obtained a right to a share in the trust's funds, either through litigation, arbitration, or settlement. The Court deems it unfair to those persons to require the trust to pay the expense of court-appointed experts in this action, especially since this litigation does not raise any complex scientific issues which the Court needs expert guidance to understand.

Conclusion

For the foregoing reasons, the plaintiff's Petition to Have the Court Appoint Expert Witnesses (Doc. No. 71) is DENIED.

SO ORDERED

_____/S/_____
ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut, this 3rd day of June, 1998.

Excerpt from Disclosure dated April 6, 1998 –

The following listing of potential witnesses is hereby submitted of persons who have relevant knowledge and may or may not testify at the trial made the basis of this lawsuit. The Pro Se Plaintiff will supplement in accordance with the Rules of Federal Procedure.

Richard Sweet
300 Halket Street
Pittsburgh, Pennsylvania

Michael Glass
614 Elm Street Extension
Ithaca, New York 14886

Mike McGlynn
75 Main Street
Norwalk, Connecticut

David B. Weinstein
166 West Broad Street
Stamford, Connecticut

Dorothea Linley
220 Banks Road
Easton, Connecticut

Corbett H. Thigpen
5268 Columbia Road
Grovetown, Georgia

Joseph Chambers
800 Howard Avenue
New Haven, Connecticut

Ari Kiev
150 East 69th Street
New York City, New York

Theodore Reed III
20 University Boulevard
Baltimore, Maryland 21218

William McCoy

Tallahassee, Florida

Raye Peat
Post Office Box 5764
Eugene, Oregon 97405

Melvin P. Hennisch
24-04 Woods Brooke Circle
Ossining, New York

Stephan D. Sarfaty
1095 South Main Street
Cheshire, Connecticut 06410-4056

Gerald D. Roberts
162 Kings Highway North
Westport, Connecticut

Sidney Baker
40 Hillside Road, North
Weston, Connecticut 06883

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LYNN GOLD	:	
VS.	:	Case No. B-82-383 (EBB)
THE DALKON SHIELD CLAIMANTS TRUST	:	May 11, 1998

PETITION TO THE COURT TO HAVE THE COURT APPOINT EXPERT WITNESSES UNDER RULE 706

AFFIDAVIT

. . . .

3. I have tried to get expert witnesses and the salient problem is that money must be put up[front in order to obtain their services and I do not have that kind of money at this moment in time. Another problem is the reluctance to deal with a pro se party rather than a lawyer which is also related to the belief on the part of potential experts that they will not be compensated.

4. With a court appointment of expert witnesses, a lawyer may even be willing to come on since he will not have to assume the financial responsibility for expert fees. What I have been otherwise doing is informally consulting with certain attorneys and knowledgeable persons.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LYNN GOLD	:	
VS.	:	Case No. B-82-383 (EBB)
THE DALKON SHIELD CLAIMANTS TRUST	:	May 22, 1998

AFFIDAVIT

In Support of Memorandum of Law in Opposition to Defendants' *Motion for Summary Judgment*

. . . .

5. I plan to depose David Weinstein, MD and can expect to prove some of the material facts as to which there are genuine issues to be tried. His testimony should tend to prove at least one instance of injury. The purpose of this deposition is to provide testimony which I cannot get any other way since his cooperation has been nearly totally lacking from the 80s to date.

6. The claim of the Defense of not being notified of identified experts is false. Written opinions from said identified experts was not submitted because none of the experts has been retained.

. . .

17. A letter on my behalf was recently sent to Dr. Weinstein by an attorney friend of mine in Stamford, Connecticut. The gist of the letter was to ask Dr. David B. Weinstein if he could meet with this lawyer in order to find out what these contemporaneous records said. Copies of the records were included in the letter. The attorney made several follow-up phone calls but Dr. Weinstein did not either return his calls, acknowledge his letter or respond in any other manner. . . .

Excerpt from Memorandum in Support of Petition to the Court To Have the Court Appoint Expert Witnesses Under Rule 706

. . . .

B. Difficulty of Plaintiff in obtaining experts

The Plaintiff is under an extreme hardship in obtaining expert medical testimony. First, she lacks the financial wherewithal to retain an expert and has found, despite numerous tries, that experts will not even look at the facts of the case without the assurance of payment. Second, because of the need for assurance of payment, they are unwilling to consider her matter because she lacks the deep pockets of an established law firm.

STATEMENT OF LAW

Under Rule 706 the Court has the power, wither sua sponte or on motion by any party, to appoint one or more expert witnesses. The rule was promulgated to provide for fairness where one party is disadvantaged.

The rule has not often been applied because in most cases the law firms which take Plaintiff's cases are able to easily put forward the funds necessary to obtain witnesses. The defense cases are usually funded by insurance carriers and again there are sufficient funds. Hence, only in a case where either the Court feels all parties are failing to provide testimony the Court feels is necessary for its determination or where there is such a disparity between comparative abilities of the parties to obtain necessary expert testimony is the application of Rule 706 necessary.

Excerpt from
Memorandum Of Law In Opposition To Defendant's Motion For Summary Judgment dated May 22, 1998

Preliminary Discussion

It is necessary to briefly respond to the Defense reasons to support its motion. With reference to #1 and #2 of the Defense reasons, the Plaintiff avers that she has indeed identified expert witnesses. Some of whom may be called on trial, but said potential witnesses have not provided written opinions because they have not been retained by the Plaintiff. In the Federal Civil Judicial Procedure and Rules, 1998 Edition, it indicates in Rule 26 (a) 2 (B) that this is required only for those expert witnesses who are retained.

Regarding Defense reason #3, the Plaintiff can establish the injury, defects(s) with the Dalkon Shield and the causative connection in the Plaintiff's situation with exert witnesses, medical records, professional scientific literature reports and articles, various studies, depositions and appropriate admissions of evidence and testimony which has been admitted in other Dalkon Shield trials.

Referencing reason #4, the Plaintiff avers that she has identified potential witnesses in a timely fashion, and she has – medical evidence which will prove the essential injury and the causative connection with the Dalkon Shield; additional evidence admitted at other trials will demonstrate proof as to the defect(s) of the Dalkon Shield; and, with expert witnesses, as demanded by the Defense and provided under the auspices of Rule 706, there will be more than enough evidence to show the existence of additional genuine issues of material fact to be tried. **The court should note that discovery and admissions are not completed.** . . .

From page 3 of 23

. . . .

The Plaintiff has ample evidence to support essential elements of her claim and there is sufficient medical evidence to prove injuries. **The Defense chooses to provide only part of a document when the missing part refutes what the Defense is claiming as in Defense Exhibit C4, which is only part of the contemporaneous notes from Dr. Weinstein.** This demonstrates neglect on the part of the Defense in their failure to include necessary and pertinent information. The Defense left stuff out so as to deceive the court.

The Plaintiff has responded to the Defense demand for an expert witness by filing a motion on Monday, May 11, 1998 – Petition To The Court To Have The Court Appoint Expert Witnesses Under Rule 706. This motion included copies of pertinent medical records, an affidavit and a memorandum in support. The Plaintiff also filed a motion to extend the deadline for discovery because, among other things, of the necessity to obtain additional information and production from the Defense.

In the section titled "Statement of Medical Facts," the Defense had made the statement,

> "According to the medical records, there is no diagnosis of an injury during the time Ms. Gold used the Dalkon Shield."

This is not a statement of medical fact or material fact – it's some fantasy of the Defense.

From page 4 of 23

In fact, the Defense has listed 'internal adhesions and scarring' and 'impaired fertility' as examples of injuries claimed and yet did not include the narrative reports from two (2) hysterosalpingograms which clearly show that the Plaintiff has such internal adhesions and scarring. The Plaintiff has her evidence her fertility is impaired because, on 7/8/80, the narrative report from a hysterosalpingogram indicated that

> "A 30 minute delayed film shows retention of contrast within the sac-like tubular dilations of both Fallopian tubes. No definite spillage was seen from either tube during the course of this study."

The 4/2/81 hysterosalpingogram narrative further indicated,

> "Both outer Fallopian tubes again seem to be dilated within the dilated ampullary segments on a delayed film. Impression: Persistent hyrosalpinx presumably due to past PID."

Furthermore, the Plaintiff has on more than one occasion submitted to several of the venereal disease tests to rule this out as a possible cause of the infertility. Although the 80s tests were lost by Dr. Weinstein and/or not properly preserved by David Golub, mention of those test results was also conveniently left out of the Defense summary judgment request since these results would support the claims of Dalkon Shield injury by eliminating the other cause (attachment D and M) of PID [pelvic inflammatory disease]. . . .

Rule 56. Summary Judgment. (F) When Affidavits are Unavailable. states,

> "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuation to permit affidavits to be obtained or depositions to be taken or discovery to be had **or may make such other order as is just**."

From page 6 of 23

In *United States v. Bloom*, 112 F.3d 200, 205 n. 17 (5th Cir. 1997), it indicates that the party must place the court on notice that additional discovery is sought and must demonstrate how discovery relates to the summary judgment motion. The Pro Se Plaintiff avers that she can probably borrow three hundred dollars to depose David Weinstein . . .

From page 7 of 23

Statement of Medical Facts

. . . . There exists an abundance of evidence to support the Plaintiff's case with much of it merely a matter of admissions and verification from expert witnesses. The Dalkon Shield can be proved to be defective not only via expert testimony but via the professional medical literature on the device, all of which has evolved over the last twenty-five to forty-two years. Using the Plaintiff's medical records, a causal link can be put forward demonstrating the likely probability that the Dalkon Shield's use was the source of the problems.

From page 12 of 23

A Statement Of Material Facts As To Which There Are Genuine Issues To Be Tried

Pursuant to Local Rules of Civil Procedure, Rule 9(c)2:

A. The Plaintiff submitted a timely list of potential experts who may or may not testify on trial but who are not yet retained or subpoenaed.

B. The Plaintiff avers that with the evidence she can provide to expert [medical records, depositions, admissions, affidavits, Defense Discovery answers] let alone any additional evidence such specialist may be able to produce on his own, she can reasonably say that such expert witnesses will contend that **(a)** there was injury to the Plaintiff, **(b)** that this injury was related with reasonable medical probability to Dalkon Shield use and **(c)** that the defects in the Dalkon Shield lent themselves, with reasonable medical probability, to such a causative link as to have brought about the injuries the Plaintiff alleges in her complaint.

From page 13 of 23

. . . . Currently, affidavits are unavailable from such persons as David Weinstein because the Plaintiff's personal experiences over a period of several years have caused her to say that this man will not cooperate after repeated attempts to dialogue. Other witnesses choose not [*to*] cooperate with a pro se party and/or refuse to speak to or deal with the Pro Se Plaintiff unless substantial advance fees are rendered. One such competent expert is Ari Kiev in New York City who requires several thousand dollars for an evaluation plus thousands more for deposition and court testimony. Thus, a granting of Rule 706 could conceivably overcome this barrier.

D. Furthermore, when discovery is complete on the part of the Plaintiff and admissions are taken care of, there will be additional evidentiary material likely to cause the court to conclude and/or draw a reasonable inference that **(a)** the scientific literature et al. Has long recognized the Dalkon Shield to be particularly likely to cause PID [pelvic inflammatory disease][1], especially with the absence of STDs [sexually transmittable diseases]; **(b)** that the literature et al, will indicate the dangerousness of the Dalkon Shield's tail string and its wicking defects and associated problems [2]; **(c)** that the literature et al. Will indicate that this danger and others were known long before the Dalkon Shield was marketed and, even after it was known to be dangerous, the company continued to sell it[3]; and **(d)** that there is abundant evidence admitted in other trials which is likely to be able to be admitted into this trial all of which will lend credence to the allegations of the Plaintiff ranging from past Dalkon Shield defects to civil conspiracy to current stonewalling and institutionalized incompetence (Attachment L.) To deceitfulness from the Dalkon Shield Claimants Trust officials.

From page 14 of 23

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[1] Dr. Carolyn Black sent two articles relating to this in September 1994 – Obstetrics and Gynecology, "The Intrauterine Device and Pelvic Inflammatory Disease Revisited: New Results From the Women's Health Study, July 1988, and Clinical Practice, "Intrauterine devices and pelvic inflammatory disease: an international perspective," March 28, 1992 (attachment K.)

[2]. A.H. Robbins, its insurance company agents and attorneys did or had done several secret wick studies and this information is capable of being accessed with a subpoena.

[3]. Investigative journalist, Morton Mintz, retired from the Washington Post newspaper and now living in Chevy Chase, Maryland, would be an excellent expert source for information concerning who did what and when they did it in this area.

Conclusion

. . . . And summary judgment may be inappropriate where the party opposing it shows under Rule 56 subdivision (f) that he cannot at the time present facts essential to justify his opposition.

> **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuation to permit affidavits to be obtained or depositions to be taken or discovery to be had **or may make such other order as is just.**

From page 16 of 23

Excerpt from Motion To Re-Argue / Reconsider the Plaintiff's Petition to the Court to Have the Court Appoint Expert Witnesses Under Rule 706

. . . .

The reasons for this request is that the Plaintiff avers that the opposing counsel has created an absolute misrepresentation of the situation to the Court. This misrepresentation consists, in part, of a claim that the Plaintiff was requesting that the ultimate payment for the witnesses be assessed to the Defense and that the Plaintiff was indigent and had not demonstrated this to the Court. The Plaintiff's claim in her affidavit was that she did not have the financial resources **at this moment in time**, not that she would never have such resources, and that was why the Plaintiff did not claim for indigence. . . .

Excerpts from Trust's Opposition to Plaintiff's Motion For Enlargement of Time To Obtain Expert Witnesses

Medical Causation

During the time she used the Dalkon Shield, no medical record shows the diagnosis of an infection in Ms. Gold's reproductive tract. . . .Endometriosis, which is not related to IUD use, is one. Dr. Weinstein diagnosed endometriosis during his treatment of Ms. Gold in 1978. (Ex. H). . . .

Pro Se Status

Although Ms. Gold presents herself to this Court as a pro se litigant, for several reasons she should not be afforded deference because she represents herself. First, Ms. Gold was initially represented by counsel. In personal injury actions such as this one the withdrawal of counsel is often a signal that the case is not meritorious. . . .

From pages 187-188 of the Appeals Appendix

Excerpt from
a contemporaneous medical record of David B. Weinstein, M.D.

Gold, Lynn Mrs. Dick 32
8 Little John Lane -6907
329-2417 914-967-6100 x207

1-31-78 pelvic exam

. . . .

? Endometritis
[initials of Dr. Weinstein]

. . . .

OBSTETRICS & GYNECOLOGY ASSOCIATES, P.C.
166 WEST BROAD STREET
SUITE 203
STAMFORD, CONN. 06902-3633

TELEPHONE 325-4321
(FAX) 975-7515

July 8, 1998

Re: Lynn Gold

To Whom it May Concern:

Lynn Gold was evaluated on January 31, 1978 for abdominal pain and diagnosed as having Endometritis and Pevic–Inflammatory Disease, most likely associated with her IUCD. She was treated with antibiotics and had her Dalkon Shield removed.

Sincerely,

/S/

David B. Weinstein, M.D.

DBW/mas

Excerpts from a letter from Dr. Sweet –

Magee-Womens Hospital
Womancare
for a lifetime

Richard L. Sweet, M.D.
Professor and Chair
(412) 641-4212
(412) 641-1133 FAX

Department of Obstetrics,
Gynecology
Reproductive Services
University of Pittsburgh
School of Medicine

June 25, 1998

Richard H. G. Cunningham
12 Kenilworth Drive East
Stamford, Connecticut 06902

RE: Lynn Gold vs. Dalkon hield Trust

Dear Mr. Cunningham:

. . . . It is my opinion that the above matter noted symptoms Ms. Gold demonstrated while wearing the Dalkon Shield demonstrate that she had pelvic inflammatory disease which resulted in the bilateral hydrosalpinx and infertility. Of critical importance is the October 5, 1994 report from the Centers for Disease Control and Prevention noting that Lynn Gold's serum specimen contained no evidence of *Chlamydia trachomatis*- specific antibodies, thus revealing that Ms. Gold most likely was never infected with *Chlamydia trachomatis*.

In summary, it is my opinion that the Dalkon Shield worn by Ms. Gold from May 3, 1972 through February 8, 1979 substantially contributed to the development of pelvic inflammatory disease which in turn resulted in the bilateral hydrosalpinx and tubal factor infertility. Further the defective design of the Dalkon Shield and its tail-string increased the risk for Ms. Gold to develop pelvic inflammatory disease.

Sincerely yours,

_____/S/_____
Richard L. Sweet, M.D.
Professor and Chair
Department of Obstetrics, Gynecology
and Reproductive Sciences

RLS:smk

Venable Letterhead

July 9, 1999

Via Telecopy

Ms. Shandello, Supervisor
Calendar Section
United States Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, NY 10007

Re: Lynn Gold v. Dalkon Shield Claimants Trust,
No. 98-9346

Dear Ms. Shandello:

At approximately 4:00 p.m. today I received by telecopy the request of Beverly Knapp, Esquire, on behalf of Appellant Lynn Gold for 20 minutes of oral argument. On behalf of the Dalkon Shield Claimants Trust I object to this last minute request because it does not give me time to request argument time for the Appellee and prepare for travel and argument. The case is scheduled to be heard on July 12, 1999.

Very truly yours,
/S/
Elizabeth C. Honeywell

ECH: mdg
cc: Beverly Knapp, Esquire
BA2DOCS1/68953

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LYNN GOLD	}	DOCKET NO: 98-9346
VS.	}	
DALKON SHIELD CLAIMANTS TRUST	}	JULY 28, 1999

Excerpts from

AFFIDAVIT OF BEVERLY S. KNAPP

. . . .

2. On June, 22 1999, I had my office prepare Notices of Appearance in this matter for both myself and Paul J. Pacifico noting the scheduled date and requesting 20 minutes or oral argument. After Mr. Pacifico had signed the Notice of Appearance, on June 23, 1999 the original Notices of Appearance addressed to the Clerk's Office were placed in our outgoing mail. Copies were sent that same date to opposing counsel, Elizabeth Honeywell. . . .

6. On Monday, July 12, 1999, attorney Paul Pacifico and I appeared for oral argument in this matter. We were informed by the Clerk in the courtroom that we would have 5 minutes for oral argument if no one appeared for the defendant. If counsel for the defendant appeared, however, the clerk indicated that each party would have 10 minutes for oral argument.

7. When the case was called, the Court (Winter, J.) Stated that there would be no oral argument due to the late receipt of our appearance and unfairness to opposing counsel, who were not present for oral argument.

8. On July 15, 1999, attorney Paul Pacifico and I had a telephone conference with attorney Elizabeth Honeywell. During such conversation, attorney Honeywell acknowledged that she had received the copies of the Notices of appearance that previously had been sent to her. She also stated that she had called the Clerk's Office earlier during the week concerning the request in the Notice of Appearance for 20 minutes of oral argument, and was informed that the Clerk's Office had no record of the Appearances. She then received on the afternoon of July 9, 1999 my letter reiterating the request for 20 minutes of oral argument contained in the notices of appearance. . . .

_____/S/_____
Beverly S. Knapp

Subscribed and sworn to before me this 28th day of July, 1999.

_____/S/_____
Susan Fortuna
Notary Public
My commission expires 6/04

Excerpt from the
Dalkon Shield Claimants Trust's Motion For Summary Judgment And Extension Of Expert Identification Deadline, Exhibit A (Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried) dated April 27, 1998 –

. . . .

3. On April 9, 1998, (Attachment B to Memorandum), the Trust wrote to Ms. Gold requesting that she provide each for expert the "written report prepared and signed by the witness" that Rule 26(a)(2) requires. The letter stated:

> If we do not receive the reports by April 15th, we will promptly file a motion for summary judgment seeking dismissal of this lawsuit on the ground that you cannot prove that the Dalkon Shield was defective or caused you any injury. Under the law, to proceed to trial you must have expert testimony to prove that the Dalkon Shield was defective and that it caused your injuries to establish the defect and causation elements of your cause of action.

4. In response, on April 15, 1998, Ms. Gold sent a letter addressed to Attorney Honeywell saying, in essence, that she has not yet retained an expert witness who will testify at the trial of this case (Attachment C to Memorandum) . . . .

From Exhibit A

Excerpt from a letter from Attorney Elizabeth Honeywell to Lynn Gold dated 4/9/98

Dear Ms. Gold:

We have received your list of "potential" expert witnesses who "may or may not" be called to testify on your behalf at trial. This list does not tell the Trust who your expert witnesses will be or what their opinions will be at trial.

In her Order dated February 20, 1998, Judge Burns directed that you identify your expert witnesses and provide copies of the experts' **opinions** in compliance with the requirements set out in Rule 26(a)(2)(B). That rule specifically requires, with respect to expert witnesses who will testify at trial, that you provide the Trust with "a written report prepared and signed by the witness." It further describes the information to be contained in that report. I enclose a copy of Rule 26, with the specific items of what must be included in your experts' reports highlighted, so there will be no mistake about the expert witness disclosure requirements. . . .

140 Southport Woods Drive
Southport, Connecticut 06490
April 15, 1998

Ms. Elizabeth C. Honeywell
Venable, Baetjer and Howard, LLP
1800 Mercantile Bank & Trust Building
Two Hopkins Plaza
Baltimore, Maryland 21201-2978

FAX: 410-244-7742

Dear Attorney Honeywell:

I did not actually receive your letter dated 4/9/99 and have it in my hands until yesterday evening due to my activities over the long Easter holiday weekend. As far as I can tell, and I have consulted with another attorney, I have indeed met the requirements of Federal Rule 26(a)(2)(B). In fact, the five line immediately prior to that which you highlighted in shocking pink magic marker says,

> "...this discourse shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony..."

When the witness has been retained by a party, what you have indicated would be the case. However, I have fulfilled the rule by the listing of the witnesses I may call at trial and, if any are retained, then what you have indicated would have to have been fulfilled.

I would also appreciate a copy of the law or ruling which says that I must have an expert witness in this action. I would additionally like to know the rule on which you are claiming to rely that indicates where a witness is listed but not yet retained, such documents, as mentioned in your 4/9/98 letter, from such an individual must be forthcoming under those circumstances.

Sincerely,
/S/
Ms. Lynn Gold

Excerpt from
Dalkon Shield Claimants Trust's Memorandum in Opposition to Plaintiff's Rule 706 Motion for Appointment of Expert Witnesses

. . . . Plaintiff filed a new round of motions . . . . including a motion asking the Court to appoint expert witnesses to testify on her behalf and at the Trust's expense. . . .In light of the now obvious lack of support for Plaintiff's allegations, the Court should not permit this case to proceed further by appointing an expert at the Trust's expense. . . .